

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TEXAS

TYLER DIVISION

08:49:21 4 GOVERNOR GREG ABBOTT, in his ) Case No. 6:22-cv-00003  
 5 official capacity as Governor )  
 6 of the State of Texas, and )  
 7 GOVERNOR MIKE DUNLEAVY, in his )  
 8 official capacity as Governor )  
 9 of Alaska, )  
 10 Plaintiffs, )  
 11 versus )  
 12 JOSEPH R. BIDEN, in his official )  
 13 capacity as President of the )  
 14 United States; DEPARTMENT OF )  
 15 DEFENSE; LLOYD AUSTIN, in his )  
 16 official capacity as Secretary of )  
 17 the Defense; DEPARTMENT OF THE AIR )  
 18 FORCE; FRANK KENDALL III, in his )  
 19 official capacity as Secretary of )  
 20 the Air Force; DEPARTMENT OF THE )  
 21 ARMY; and CHRISTINE WORMUTH, in )  
 22 her official capacity as Secretary )  
 23 of the Army, )  
 24 Defendants. ) JUNE 23, 2022  
 25 MOTION HEARING

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE JUDGE J. CAMPBELL BARKER

08:49:21 21 UNITED STATES DISTRICT JUDGE  
 22 SUSAN A. ZIELIE, FCRR, RMR  
 23 FEDERAL OFFICIAL STENOGRAPHIC COURT REPORTER  
 24 United States District Court  
 25 Eastern District of Texas  
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1 TYLER, TEXAS; JUNE 23, 2022, THURSDAY

2 10:00 A.M.

3 THE COURT: Please be seated. Good morning. We're  
4 here for a hearing in Case Number 6:22-cv-3, Abbott versus  
10:07:45 5 Biden.

6 Will the parties please make their appearances.

7 MR. HILTON: Chris Hilton from the Attorney  
8 General's Office on behalf of Governor Abbott. I'm joined by  
9 my colleague, Leif Olson.

10:08:00 10 MR. ROBISON: Good morning, Your Honor. Chris  
11 Robison from the Alaska Attorney General's Office on behalf  
12 of Governor Dunleavy.

13 MR. AVALONE: Good morning. Zachary Avallone from  
14 the US Department of Justice, here on behalf of defendants.

10:08:15 15 MR. GILLINGHAM: Your Honor, James Gillingham with  
16 the Unites States Attorney's Office on behalf of defendants.

17 THE COURT: Very well. Thank you.

18 Before the court is plaintiffs' motion for  
19 preliminary injunction, and I've read all of the motion  
10:08:27 20 briefing.

21 Let me begin by hearing briefly from plaintiffs. I  
22 want to first address my understanding of how the National  
23 Guard system relates with the relevant constitutional  
24 provisions.

10:08:48 25 So I'll take a minute and lay out my reading of the

1 Constitution and how that overlays with the relevant  
2 statutory provisions establishing the National Guard system  
3 and then let you correct me where I've misspoken or you  
4 disagree or you think there's some other provisions that I  
10:09:10 5 ought to look at.

6 The relevant constitutional provisions concerning  
7 militia are in Article I, Section 8 of the Constitution,  
8 along with a series of clauses, Clauses 12 through 16, that  
9 all concern the various parts of the fighting forces of the  
10:09:31 10 country; Article II, which makes the President the  
11 commander-in-chief of the Army and Navy and then also of the  
12 militia when called into the national service; and then, of  
13 course, the Second Amendment mentions the militia as well.

14 At the time of the founding of the common law, the  
10:09:54 15 militia was essentially just able-bodied men of fighting age.  
16 That understanding of the militia still exists today, and the  
17 Supreme Court has recognized that governance of the militia,  
18 as a matter of background law, outside of constitutional  
19 authority, rests with the states. Under the laws of Texas  
10:10:20 20 and Alaska, the commander-in-chief of the militia is the  
21 governor of each respective state.

22 However, each state has organized its militia --  
23 although, each state also, I believe, recognizes an  
24 unorganized broader militia that's out in the diffuse  
10:10:37 25 population -- but each state has organized its militia and

1 imposed order and rules for its militia.

2 Congress's power over the militia includes the  
3 power, under Section 8 of Article I, Clause 15, to call the  
4 militia into federal service if certain conditions are met.

10:11:05 5 And then, under Clause 16, Congress is given the power over  
6 the militia, when not in federal service, to organize, arm,  
7 and discipline the militia. However, the power to govern the  
8 militia and to appoint officers is reserved to the State;  
9 and, as to governance, turns to Congress only when the  
10:11:31 10 militia is called into national service.

11 Likewise, Article II recognizes the President's  
12 commander-in-chief power only when the militia has been  
13 federalized.

14 The National Guard system was created by Congress  
10:11:53 15 by statute. It was created in a series of amendments over  
16 time; but, as I understand, it essentially reached its final  
17 form in the 1930s, I believe in 1933, as a result of  
18 modernization that took place starting in the 1900s, and  
19 creates -- in Title 32 of the United States Code, Congress  
10:12:19 20 has created two entities that are defined in Section 101.

21 One entity is called the National Guard, and that  
22 refers to the National Guard of the various states. It has  
23 an Army component and an Air Force component. And the second  
24 entity is the National Guard of the United States, which also  
10:12:40 25 has an Army and an Air Force component.

1 And, essentially, the National Guard -- the  
2 definition of the National Guard refers to a subset of the  
3 militia in a state. To qualify as being in that subset of  
4 the militia, who is -- and it also defines being in the  
5 National Guard -- members have to meet certain requirements  
6 laid out in the statute, in the definitional section of that  
7 statute.

8 Essentially, they have to be federally recognized.  
9 They have to be part of the organized militia of a state.  
10 They have to be part of the militia in the sense that the  
11 state governor appoints their officers, as understood in  
12 Article I, Section 8, Clause 16. And then the statute in  
13 other provisions lays out what's required to receive federal  
14 recognition.

15 Also, to be part of the National Guard as defined  
16 in the statute, a member must volunteer to be dual-enlisted  
17 in the National Guard of the United States, which is defined  
18 as a reserve component of the Army.

19 In this case, the United States agrees with the  
20 plaintiffs -- I believe I agree as well -- that membership in  
21 the reserve component of the Army does not mean that the  
22 person is always under the President's Article II  
23 commander-in-chief power. Rather, the person must first be  
24 activated or called into active service in the Army to fall  
25 within the President's constant Article II power. Otherwise,

1 the reservation of the militia limitations in Article I and  
2 Article II apply to members in reserve status.

3 So, if a member of the state militia meets these  
4 definitional requirements in the federal statute, that member  
10:15:01 5 of the militia and then, collectively, the unit of all those  
6 members are recognized under federal law as part of the  
7 National Guard, and the same members are also recognized as  
8 part of the National Guard of the United States.

9 And that, in turn, qualifies that particular subset  
10:15:22 10 of the militia for federal benefits. The federal government  
11 will pay those people for their time. They will provide the  
12 potential for retirement benefits, and they can accrue credit  
13 or points towards the retirement benefits. The federal  
14 government provides equipment, and it may pay the National  
10:15:49 15 Guard for the cost of maintaining or replenishing that  
16 equipment. So there's a whole host of federal benefits that  
17 the federal government confers on units and members who meet  
18 the federal government's requirements of the National Guard.

19 That spending is within Congress's constitutional  
10:16:14 20 power under both the spending clause of the Constitution and  
21 as to arming that subset of the militia, also under Article  
22 I, Section 8, Clause 16, which refers to arming the militia.  
23 But, in other respects, spending money on the militia, paying  
24 the members of a state militia, would appear to me to be an  
10:16:39 25 exercise of the spending clause of the Constitution.

1           The federal government does not pay every member of  
2 a state militia. As noted, the National Guard is only a  
3 subset of the state militia, comprised of members who  
4 volunteer for dual-enlistment and voluntarily meet the other  
10:17:02 5 standards requirement for recognition, federally, as part of  
6 the National Guard.

7           There remains other parts of the state militia.  
8 There is the undifferentiated militia -- or the unorganized  
9 militia, rather -- and then there's also another subset of  
10:17:16 10 the militia that is organized but is not part of the National  
11 Guard. I believe that's referred to, federally, as part of a  
12 state force. In Texas, it's the Texas State Guard. And I  
13 believe, in Alaska, it's the Alaska State Defense Force.

14           So that is my background understanding of the  
10:17:38 15 relevant constitutional authorities and the relevant law.  
16 I'll say a word more about my tentative thoughts on how that  
17 bears on the issue but allow you to correct me as to my  
18 understanding of the background law.

19           The militia clauses of the Constitution were  
10:18:03 20 designed to strike a balance between a number of different  
21 interests. On the one hand, supplementing the federal  
22 fighting forces, which many of the framers were wary of a  
23 standing army and envisioned a smaller role for a federal  
24 professional fighting force, so there was a need to create  
10:18:24 25 mechanisms by which the federal government could ensure that



1 militia in the various states were ready to join the national  
2 defense force when called to that duty. So there was a need  
3 for federal standards of discipline, would be the  
4 constitutional term, as well as providing federal arms and  
10:18:44 5 organization to ensure ready integration of a militia into  
6 the national fighting force.

7           There was a competing concern with having standing  
8 armies and loyalty to the federal rulers, and part of the  
9 compromise in the militia clause was allowing the states to  
10:19:04 10 appoint the officers of militia and to govern the militia  
11 when not called into federal service, so that, even though  
12 the standards under which the state was governing its militia  
13 were set forth -- could be set by Congress as part of the  
14 federal discipline, the personnel and the execution of those  
10:19:24 15 standards would be selected by the state as a measure  
16 intended to create bonds of loyalty with states and not just  
17 to national rulers.

18           Nothing in the Constitution requires the federal  
19 government to arm a state militia. Congress is empowered to  
10:19:44 20 do so, but nothing requires Congress to do so. Nothing in  
21 the Constitution requires Congress to fund any portion of the  
22 exercises of a state militia, to pay any member of a state  
23 militia for their service as such, to provide any funds for a  
24 state militia to run as such. Congress is empowered to do so  
10:20:08 25 by the spending clause as to payments, but nothing requires

1 Congress to do so.

2 So the protections of the division of authority in  
3 the second militia clause of Article I were intended to  
4 balance those interests, but nothing requires Congress to  
10:20:32 5 provide any funding at all for a state militia. Nothing in  
6 the Constitution.

7 So, in this case, as I had mentioned, most states  
8 have a militia that includes a subset recognized as part of  
9 the National Guard; and, because of the dualness regime that  
10:20:55 10 those members volunteered for, are also members of the  
11 National Guard of the United States.

12 Congress has delegated to the President the power  
13 to set standards of discipline and to organize the National  
14 Guard. That's Title 32, United States Code Section 110, I  
10:21:18 15 believe. The President has claimed to exercise that  
16 authority here. Well, I believe the President's also claimed  
17 to exercise all constitutional authority, including under the  
18 spending clause, to either spend money or put conditions on  
19 its spending of money for the support of that subset of the  
10:21:43 20 militia.

21 But no one is arguing and no one's disputing that  
22 the federal government has not ordered all members of a state  
23 militia to receive COVID-19 vaccinations. The order applies  
24 only to that subset of the members of the militia who had  
10:22:02 25 joined a unit that is voluntarily meeting federal standards

1 of discipline and organization in exchange for receiving a  
2 voluntary federal commitment to provide pay, funding,  
3 retirement benefits, arms, things that the government may  
4 optionally provide.

10:22:25 5 So, based on that structure, the defendants argue  
6 that the consequences from members of the National Guard  
7 subject to the vaccination mandate at issue for  
8 non-compliance are, essentially, a withdrawal or withholding  
9 of different forms of federal benefits that Congress is not  
10:22:52 10 required to afford in the first place and is thus allowed to  
11 place conditions on, those benefits being pay, recognition,  
12 the consequence of which is eligibility for retirement  
13 benefits, points towards retirement, and retirement credit.

14 And I think that plaintiffs' response to that is  
10:23:26 15 that withholding pay from an individual guardsman, as opposed  
16 to a National Guard unit, is the relevant constitutional  
17 distinction, and that withholding federal pay from an  
18 individual guardsman, under the National Guard system, would  
19 cross the line into governance of a state militia within the  
10:23:56 20 meaning of Article I, Section 8, Clause 16. Whereas,  
21 withholding pay from a National Guard unit, I think the  
22 plaintiffs concede that would be fine. That would be  
23 constitutional, at least.

24 Okay. So I've put that on the table, my reading of  
10:24:11 25 the Constitution, the statutes, and the parties' positions in

1 this case.

2 Plaintiff, this is your motion, so let me give you  
3 a chance to open, present your high-level case, and then also  
4 correct me or point out any modifications to my understanding  
10:24:30 5 of the case and the arguments.

6 MR. HILTON: Thank you, Your Honor. I think I  
7 agree with everything you just outlined. Could not have and  
8 was not going to say it better myself. So very few quibbles  
9 with what Your Honor outlined.

10:24:47 10 I think it's important to begin with what is the  
11 authority that the defendants have to withhold this funding  
12 and how do they go about it? That, to us, is what the case  
13 is really all about.

14 The case is not about whether the President can and  
10:25:01 15 the federal government can set readiness requirements for  
16 National Guard members. Of course it can, under 32 USC  
17 Section 110. And it's not about whether consequences can  
18 flow from failure to meet those readiness requirements.  
19 Absolutely, they can.

10:25:19 20 But Congress has been very clear about how the  
21 defendants in this case have to go about imposing those  
22 consequences. What defendants have done here is ignore the  
23 tools that are available to them; and, instead, without  
24 having -- without being in charge of these forces, because  
10:25:38 25 they haven't been federalized, they've attempted to order

1     them directly to receive the vaccine and attempted to order  
2     that specific punishments at specific times will be incurred  
3     for failure to do so. That's not one of the tools available  
4     to the defendants to achieve their goals here.

10:25:58 5             Our position is that there are three basic tools  
6     that the defendants have here to achieve compliance with  
7     their readiness requirement with the COVID vaccine. They can  
8     withdraw consent to participate in active guard reserve duty.  
9     They can withdraw federal recognition, which, as Your Honor  
10:26:17 10    pointed out, that's what entitles these guardsmen to pay, and  
11    to benefits, and to retirement points.

12             And then there's 32 USC Section 108, which provides  
13    for the withholding of funds from a state and a state's  
14    National Guard.

10:26:32 15             With respect to withdrawing consent, they have done  
16    that, and that relates to active guard and reserve service.  
17    It does not relate, however, to drill status. The withdrawal  
18    of consent is limited to only active guard and reserve  
19    service -- status, rather. So that is not what's at issue  
10:26:57 20    here. What's at issue here is regular drill status for the  
21    vast majority of national guardsmen, which is what we think  
22    of when we think of the National Guard, one week a month, two  
23    weeks a year, participating in that. So that withdrawal and  
24    consent does not affect drill status under federal law.

10:27:13 25             With respect to withdrawal of recognition,

1 defendants have not taken that step, and I think they've at  
2 least indicated that they don't intend to or at least don't  
3 want to. They've acknowledged that that's a long process; it  
4 can take months. There are many procedural protections and  
10:27:33 5 requirements that they must go through, and they have not  
6 gone through that process.

7 Now, if they were to go through that process and  
8 withdraw recognition from an individual guardsman, which they  
9 can, then I think the consequences that would flow from that  
10:27:45 10 would look very similar to what we have called the  
11 enforcement memoranda. But they haven't gone through that  
12 process. They haven't done that.

13 So they're left with 32 USC Section 108, and that  
14 is -- the wording of that statute is important because it  
10:27:59 15 doesn't talk about individual guardsmen. It talks about the  
16 state and the National Guard of that state. It says the  
17 President may withhold money, in whole or in part, based on  
18 the timelines that the President prescribes, and it doesn't  
19 talk about doing that with respect to individual guardsmen.

10:28:18 20 The United States has argued in briefing before  
21 many courts, for years, that this is the sole available  
22 remedy to them in cases where the administrator of the  
23 governance of the National Guard on a day-to-day basis is at  
24 issue, which it is with the readiness requirement. And  
10:28:36 25 they've argued again and again they should not be held

1 responsible over day-to-day decisions regarding individual  
2 guardsmen.

3 We quote some of that briefing -- and I don't  
4 believe defendants try to walk away from it or respond to  
10:28:46 5 it -- on page 13 of our motion.

6 The United States put it well in a brief to the  
7 DC Circuit, December 9, 2009: If a state National Guard  
8 fails to comply with the regulation or orders issued pursuant  
9 to 32 USC Section 110 -- which is what we are talking about  
10:29:06 10 here -- then the federal government has only one remedy, to  
11 withhold funds under 32 USC Section 108.

12 So I think we all agree about the tool box and what  
13 is available to defendants.

14 Now, what defendants -- they also purport to have  
10:29:25 15 invoked Section 108 in their documents, but what they've  
16 actually done here can't be squared with the text of 108 and  
17 in the way in which they've described it in their own  
18 briefing and the way that that reads.

19 Section 108 relates to the state as a whole. If  
10:29:40 20 the state -- if the federal government is not happy with how  
21 the state is running its National Guard and governing it,  
22 they can withhold funds. As you say, they're not required to  
23 fund, or train, or anything like that.

24 So the specific actions that they've dictated here  
10:29:54 25 are important. They announced a vaccination requirement on

1 August 24, 2021. It wasn't until November 30th that the  
2 requirement came out from the secretary of defense that  
3 Title 32 guardsmen can't participate in drills or training or  
4 other duty, that they will have their paychecks withheld,  
10:30:14 5 that there won't be credit for excused absences, but that  
6 ended with "specific policies will be forthcoming." And so  
7 it wasn't clear exactly what was going to happen.

8 Then, December 7, the secretary of the Air Force  
9 issues some specific guidance. Sets a deadline for the end  
10:30:32 10 of December, giving guardsmen very little notice, and saying  
11 that they'll be able to withdraw their consent for active  
12 guard and service status, and saying they won't be able to  
13 participate in drills and training, and even going so far as  
14 to order recoupment, taking money out of individual  
10:30:49 15 guardsmen's pockets for any unearned or special incentives.

16 The Department of Army issued similar orders on  
17 December 14, 2021.

18 On December 16th, Governor Abbott sent a letter to  
19 the secretary of defense, and we didn't get a response until  
10:31:06 20 after filing this lawsuit on January 27th.

21 So, again, the question in this case is not whether  
22 defendants have to pay this money, whether or not there are  
23 consequences for Governor Abbott's order not to impose a  
24 vaccination mandate, but defendants have to go about it in  
10:31:22 25 the right way. They cannot -- President Biden can't hide



1 behind Secretary Austin. He can't commandeer Governor Abbott  
2 or Governor Dunleavy.

3 He has to own this decision, either by federalizing  
4 the National Guard and ordering the vaccination himself or by  
10:31:37 5 going through the -- using the approved tools that Congress  
6 has laid out for him to use. And he has to own that decision  
7 with all the accompanying political and pecuniary costs. He  
8 hasn't done that; and, therefore, he can't inflict these  
9 specific and detailed punishments that the enforcement  
10:31:55 10 memoranda provide.

11 And one area where I would just add a little bit of  
12 expansion to the background considerations that Your Honor  
13 very eloquently laid out. When we're talking about the  
14 fundamental compromise of the militia clauses and the  
10:32:09 15 structure that the framers set out, something that was very  
16 important to them, was who can inflict punishment.

17 They were very concerned that a centralized federal  
18 government in charge of punishment and in charge of these  
19 specific and detailed consequences for failure to follow an  
10:32:29 20 order or failure to meet a requirement, that that could be  
21 used as a tool of oppression and effectively undermine state  
22 militias.

23 Because of that, it's extremely important that,  
24 when the chain of command is with the states -- which it is  
10:32:42 25 right now. Because these guardsmen we're talking about have

1 not been federalized -- that that punishment comes from their  
2 commanders-in-chief, which are the governors of Texas and  
3 Alaska.

4 So I went on a little bit longer than I intended,  
10:32:55 5 but I hope I've answered your questions in there. I'm happy  
6 to continue to run through the rest of our case or answer any  
7 specific questions, however you'd like me to proceed.

8 THE COURT: Sure. Under the relevant memoranda,  
9 what are all the consequences to a member of the -- let's say  
10:33:12 10 the Texas National Guard, to use an example here, for failing  
11 to receive the COVID-19 vaccination?

12 It's withholding of pay; right?

13 MR. HILTON: That's correct.

14 THE COURT: Denial of credit for retirement  
10:33:31 15 purposes. And also a denial of an excused absence from the  
16 training from which they are excluded, which would ultimately  
17 have the effect of making that person ineligible for service  
18 as part of the National Guard as defined in 32 USC Section  
19 101 as being recognized under federal standards. Is that  
10:34:10 20 right?

21 MR. HILTON: My understanding is that if, because  
22 of the no-excused-absences component of this, if a guardsman  
23 were to miss three weekends, three of his monthly  
24 obligations, at that point he'd automatically proceed to be  
10:34:37 25 discharged.

1 THE COURT: And so what's your best authority that  
2 withholding of pay and eligibility for benefits is outside  
3 the scope of Section 108 of Title 32, which concerns the  
4 National Guard being barred, in whole or in part, from  
10:35:03 5 receiving money or any other aid, benefit, or privilege?

6 I mean, I think the defendants are arguing that  
7 denial of pay and of other access to the conditions to get  
8 recognition federally and federal money would qualify as the  
9 President -- or as the denial, in part, to the National Guard  
10:35:37 10 of money, aid, or benefit in the sense that the National  
11 Guard is made up of its members, and each member is part of  
12 the National Guard; so denying pay to an individual guardsman  
13 is denying pay, in part, to the National Guard of the state.

14 What's your best authority to otherwise?

10:36:00 15 MR. HILTON: So, Your Honor, I don't know that I  
16 have a case for you exactly on that point, but let me lay out  
17 why I think their reading of this is incorrect.

18 And I agree with you that, essentially, their  
19 argument is this is a denial, in part, of funding.

10:36:20 20 To begin, this can't be squared with the text of  
21 Section 108. Section 108 talks about a state failing to  
22 comply with a requirement of this title, it does not talk  
23 about an individual guardsman failing to comply with the  
24 requirement of this title.

10:36:34 25 So defendants would be perfectly within their

1 rights to say: Governor Abbott, as long as your Order GA 39  
2 stands, you're not complying within this title, and we're  
3 going to reduce, as a top-line matter, the funds that we  
4 provide to the state of Texas an amount of money equivalent  
10:36:51 5 to, you know, your percentage of unvaccinated guardsmen.  
6 That's our position for how 108 should operate.

7 So that's one problem, is they're addressing the  
8 wrong violation, or, rather, the wrong violator. Here, their  
9 quibble should be with Governor Abbott. Instead, they're  
10:37:13 10 going after individual guardsmen. They have no leverage to  
11 fight back, and there's no negotiating power. And an  
12 individual guardsman is powerless in the face of that.

13 Whereas, if they were to follow the procedure of  
14 Section 108 and alert the state that it's failing to comply  
10:37:32 15 with the requirement of this title, as they should have, then  
16 that would be a decision for the President. And he could  
17 certainly make that, but then it would be clear that he is  
18 defunding the Texas National Guard and not going after  
19 individual guardsmen.

10:37:49 20 It is his responsibility for withholding this money  
21 or any other aid, or benefit, or privilege, in whole or in  
22 part, not the responsibility of the individual guardsmen for  
23 failing to comply for the readiness requirement.

24 Our supporting evidence to our motion for  
10:38:04 25 preliminary injunction makes clear -- I think this is from,

1 actually, General Norris -- that this is an unprecedented way  
2 of dealing with a vaccination requirement. This is  
3 usually -- readiness requirements like this are handled at  
4 the unit commander level. This is not something that has, at  
10:38:22 5 least to our knowledge, ever been something that's a federal  
6 policy saying, you will be discharged if you don't have X  
7 vaccine by X date and pay withheld. And part of the reason  
8 why we don't have an authority squarely addressing this issue  
9 is because this is the first time they've tried to do  
10:38:38 10 something like this.

11 The other point I would make about this, Your  
12 Honor, in addition to going after the wrong target -- if they  
13 do want to go after the target of an individual guardsman,  
14 then they are using the wrong process. They have that  
10:38:52 15 process detailed for them by Congress, and that's the  
16 withdrawal of federal recognition. And they've explained in  
17 their papers that that process takes months, that that's not  
18 something that they've done.

19 They have withdrawn consent for active guard and  
10:39:06 20 reserve status. But as Your Honor correctly noted, the  
21 federal recognition is what establishes the entitlement to  
22 pay, benefits, and retirement credits, and on and on. Until  
23 that recognition is withdrawn, those individual guardsmen are  
24 entitled to pay. It's as simple as that. And Section 108  
10:39:27 25 doesn't alter that conclusion.

1           The requirement -- and in order to make all of  
2       these determinations, Title 32 USC Section 105 provides the  
3       vehicle for defendants to do that. They can go out and do  
4       inspections of guardsmen, or units, or of the entire state.  
10:39:46 5       They haven't gone through that process either. They've  
6       simply decreed that anyone who is not vaccinated is going to  
7       have their pay withheld.

8           And, you know, the requirement here is for the  
9       State to certify that it's ready to meet any needs that the  
10:40:00 10      federal government may have, and that's not what they've  
11      targeted. They've targeted the individual guardsmen who  
12      haven't chosen to get the vaccine. They've chosen to put  
13      their lives on the line for their country, but they haven't  
14      chosen to get the vaccine. And now defendants have targeted  
10:40:16 15      them, as opposed to targeting the State and Governor Abbott,  
16      who is the real and appropriate target under Section 108.

17           So that would be my response to what I agree is  
18      their primary contention, that this is a withholding, in  
19      part, of funds under 108.

10:40:31 20           THE COURT: Right. I'm looking at General Norris's  
21      declaration, which is Exhibit 7 to your motion for  
22      preliminary injunction, Docket Number 25-7.

23           And, on page 3, paragraph 12, General Norris  
24      indicates that, in the November 30th memo, the secretary of  
10:41:02 25      defense prohibited unvaccinated guardsmen from participating

1 in Title 32 paid status.

2 So it appears that the parties agree that the  
3 consequence is pay to the guardsmen. That's the primary  
4 consequence, pay in the form of current pay, pay in the form  
10:41:24 5 of getting credit for future retirement pay or for retirement  
6 benefits that have monetary value, insurance, that sort of  
7 thing.

8 MR. HILTON: That's right. That's the  
9 November 30th letter from the secretary of defense. That's  
10:41:35 10 Exhibit 4 to our motion. And that did not, itself, set out  
11 any timelines or specifics. Those were forthcoming at that  
12 point. But that is where that requirement was put out  
13 there.

14 THE COURT: Is there any other -- and I'm looking  
10:41:47 15 at that provision, but I'm asking is there any other part of  
16 this declaration or other evidence that shows another  
17 consequence to a member of a National Guard of a state  
18 specifically court-martial and restriction of liberty,  
19 imprisonment, confinement? Or is the consequence solely in  
10:42:10 20 the general category of withholding of certain benefits, or  
21 pecuniary remuneration, or, potentially, recoupment of pay?

22 Is there any liberty interest that could be  
23 withdrawn or impinged upon for violation of the COVID  
24 vaccination readiness standard? And, if so, where is that in  
10:42:38 25 the evidence?

1 MR. HILTON: Not that I'm aware of, as such, within  
2 the enforcement memoranda.

3 So, as far as where are the requirements, I think  
4 there is an argument that protected liberty interests are  
10:42:50 5 being invaded by guardsmen being put to this choice, but I  
6 want to go through the specifics of what they're asking for  
7 first.

8 Within General Norris's declaration, this general  
9 section is what, you know, in her declaration describes the  
10:43:04 10 requirements. I think paragraph 19 of this declaration is  
11 particularly noteworthy because that describes the follow-on  
12 order by the Department of the Army. So the December 7th  
13 order, for example, only relates to the Air National Guard,  
14 but the requirements for the Army order from the  
10:43:24 15 December 14th order are in paragraph 19.

16 That order itself is not an exhibit to our motion  
17 because there was concerns about whether that could actually  
18 be filed in the public record or whether it was classified in  
19 some degree, so it's described here.

10:43:37 20 But with respect to the specific requirements that  
21 are in the enforcement memoranda that are in the record, we  
22 have the November 30th letter, which outlines: Can't  
23 participate in drills, training, or duty; no DoD funding may  
24 be allocated for payment of duties under Title 32 for  
10:43:55 25 unvaccinated guardsmen; and no credit or excused absences if



1 you missed drill because of your vaccination status.

2 On December 7th, the secretary of the Air Force  
3 withdrew consent for active guard and reserve status -- he  
4 was permitted to do that; that is a consequence -- set the  
10:44:17 5 December 31st deadline and put out that recoupment  
6 requirement, which, again, is taking money out of the pockets  
7 of guardsmen.

8 And then there is one other requirement, and I  
9 apologize, but I can't find the spot. There is a consequence  
10:44:36 10 of something about flagging the guardsman's file, that they  
11 won't be eligible for certain promotions or positions. I  
12 think that's part of the argument --

13 THE COURT: That's paragraph 18. It's the page  
14 before.

10:44:54 15 MR. HILTON: Thank you, Your Honor. That's exactly  
16 right.

17 So, as such, the enforcement memoranda don't  
18 threaten imprisonment; they don't threaten court-martial or  
19 anything like that. They just merely threaten the  
10:45:10 20 livelihoods of national guardsmen, which is, I think, no less  
21 serious.

22 THE COURT: The federal livelihood. I mean, they  
23 could always become part of the state defense force.

24 MR. HILTON: Of course. Of course.

10:45:23 25 But what I would note is that, throughout these

1 federal vaccine cases, we've seen -- particularly from the  
2 Fifth Circuit -- a recognition that, when you're putting  
3 someone to the choice of choosing between getting the shot or  
4 not getting the shot, for whatever reason, and their  
10:45:42 5 livelihoods, that is implicating a very serious interest that  
6 is worthy of concern to the federal courts.

7 In particular, there's a United Airlines case -- it  
8 was in the employment context -- that came out not too long  
9 ago. But, there, they found that being forced to choose  
10:45:57 10 between getting a vaccine over a religious objection and  
11 being terminated was, itself, irreparable injury, as opposed  
12 to merely an economic injury, because it implicated that  
13 fundamental First Amendment right to your religious beliefs.

14 THE COURT: I'm focusing now back on Section 108,  
10:46:19 15 which I think is pretty pivotal to the dispute.

16 If there was a federal -- this is a hypothetical.  
17 If there was a federal standard that said that every member  
18 of the National Guard shall be up to some sort of standard  
19 that shows their readiness to kill in action, in combat, and  
10:46:55 20 the governor of a state excused 5 percent of the National  
21 Guard from being prepared to kill, saying that we don't think  
22 that it's vitally important for them if they have a  
23 conscientious objection to killing, your argument under  
24 Section 108 is that the President would have to withhold  
10:47:29 25 money from the entire National Guard of that state as opposed

1 to just withholding federal pay for the 5 percent who were  
2 not meeting the federal readiness standards of being able to  
3 kill? Is that where your theory would come down on that  
4 hypothetical set of facts?

10:47:50 5 MR. HILTON: Yes and no. Under Section 108, I  
6 think that's correct. But through the process that Congress  
7 has laid out of withdrawal recognition, certainly the federal  
8 government can do that, and that would have the  
9 individualized consequences based on failure to meet whatever  
10:48:08 10 requirement as long as they go through that procedure.

11 THE COURT: Okay. And so, under that reading of  
12 just the 108 authority, the President could say this National  
13 Guard unit's funding is reduced by 5 percent, which is the  
14 same percentage of its members who are not up to federal  
10:48:34 15 readiness standards of being able to kill in combat.

16 Is that correct? They could do a partial  
17 reduction, but it has to be as to the whole guard unit?

18 MR. HILTON: That's right. And then that would put  
19 the onus on the commander in chief of that particular  
10:48:53 20 National Guard to figure out what to do about that, and maybe  
21 they make up that funding gap with state funding if those  
22 people still have federal recognition. It would depend on  
23 the specifics of that hypothetical.

24 THE COURT: So, for that theory to work, there has  
10:49:14 25 to be sort of a bright-line conceptual distinction between

1 the National Guard of that state, which is the language in  
2 Section 108, and the members -- the people who collectively  
3 comprise the National Guard of that state; right?

4 Is there something in federal law in the  
10:50:03 5 definitional section -- I mean, I'm focusing on this really  
6 in-depth here as we discuss it -- but is there something in  
7 the definitional section that makes that bright distinction,  
8 or could the National Guard be understood as simply the  
9 collection of its members?

10:50:06 10 MR. HILTON: I'm going to ask my colleague, Lief  
11 Olson, to try and find the definitional cite that you're  
12 asking for.

13 What I'll say first is that, with respect to 108,  
14 you know, the specific language here is instructive. This is  
10:50:21 15 talking about a state's failure to comply with the  
16 requirement in this title, not about the National Guard's  
17 failure to comply, not about a unit's failure to comply. It  
18 is talking about the state's failure to comply.

19 THE COURT: Right.

10:50:34 20 MR. HILTON: So, here, certainly, a readiness  
21 requirement or a regulation of setting forth the discipline  
22 under Section 110, that's an obligation on the state to do  
23 that training in accordance with the discipline set forth by  
24 Congress, which has delegated that to the President. Failure  
10:50:51 25 to comply with that certainly could be grounds for

1 withdrawing funding, but that is the State's failure. That  
2 is not an individual guardsman's failure, or it's not one  
3 member of the State's failure. It is the whole State's  
4 failure, and the buck stops with the commander-in-chief. So  
10:51:08 5 that is what Section 108 is really geared to.

6 And I'll also just note, you know, we're -- and I  
7 apologize.

8 I've got -- I think the definitional section that  
9 Your Honor is asking about is 32 USC Section 101(a)(3), I  
10:51:33 10 believe. No. Excuse me.

11 THE COURT: Right. National Guard -- that reads:  
12 National Guard means the Army National Guard and the Air  
13 National Guard.

14 And then (a)(4) -- well, there's no A, it's just  
10:51:48 15 4 -- reads: Army National Guard means that part of the  
16 organized militia of the several states and territories,  
17 Puerto Rico, and the District of Columbia, active and  
18 inactive, that -- and then it goes on to set forth the  
19 requirements.

10:52:10 20 So the National Guard is the entity. It's defined  
21 as part of the militia of the several states. So, if the  
22 militia is of the states, there's at least an argument that,  
23 if a member of the militia is not in compliance with the  
24 federal discipline, that means that, because it's a militia  
10:52:37 25 of the state, that the State is not in compliance with the

1 federal discipline; right?

2 What do you make of that argument?

3 MR. HILTON: I could certainly see that argument  
4 where, if the State is not in compliance if its members are  
10:52:51 5 not in compliance, that noncompliance would flow up from the  
6 National Guard members to the State.

7 But, again, that would still be the State's failure  
8 under that reading; and, certainly, as it interacts with 108.

9 THE COURT: Then I guess my other question is, just  
10:53:13 10 to make sure I'm understanding, that these are all --  
11 assuming that this is statutorily authorized, which is what  
12 we've been discussing about Section 108, if it were  
13 statutorily authorized, then, from a constitutional  
14 perspective, these all fall into the category of conditions  
10:53:38 15 on federal spending; right?

16 Because they're not -- I think we've agreed that  
17 these memos don't restrict the liberty of a militia member,  
18 but what they do do is set the conditions under which some  
19 subset of the militia can volunteer to be part of this more  
10:54:02 20 limited class of militia members who get federal pay, federal  
21 funding as part of what's called the National Guard. Which,  
22 the federal government does have authority under the spending  
23 clause to put conditions on its spending. But what it  
24 doesn't have the authority to do, at least outside of  
10:54:26 25 federalizing a militia, is to govern them.

1 But the consequences of this order are not  
2 applicable outside of the National Guard, right? It's not  
3 applicable to a defense force or to you and me as part of  
4 able-bodied men within a certain age who live in this state,  
10:54:49 5 and therefore part of the -- I think it's called the  
6 unorganized militia.

7 Right? Is that right?

8 MR. HILTON: Yeah, that's correct.

9 And with respect to the spending clause, certainly,  
10:54:59 10 again, we're not disputing that the defendants have no  
11 obligation to pay for National Guard training or units or  
12 members who they don't wish to pay for. I think they have  
13 that authority.

14 But when we talk about the spending clause, of  
10:55:14 15 course, that's Congress's authority, and Congress has made  
16 very clear how the spending on national guardsmen should  
17 proceed. If you are recognized, then you receive pay. If  
18 you're not recognized, then you don't receive pay.

19 And Congress was clear that the way to withhold pay  
10:55:36 20 from an individual guardsman, as opposed to a state, for  
21 failure to comply under Section 108 is to withdraw  
22 recognition. And, again, the defendants don't dispute and I  
23 think have no intention of going down that road of  
24 withdrawing recognition. And, perhaps they may, but they  
10:55:53 25 haven't yet. And I think, if they were to do that, that

1 would be entirely consistent with what we're arguing. I  
2 think they would have the authority do that.

3 THE COURT: As to the irreparable injury, it did  
4 seem like you had made out a pretty good case that some  
10:56:13 5 percentage of your attrition -- a pretty good case that some  
6 percentage of your force would rather retire from the  
7 National Guard entirely than stay on under the vaccination  
8 requirement and that that attrition would -- some percentage  
9 of that attrition, at least, would be in excess of what you  
10:56:39 10 might call organic attrition or preexisting attrition.

11 Do you have any sense, of those individuals who  
12 left the National Guard on account of this requirement, what  
13 percentage would join the state defense force? I think it's  
14 called the Texas State Guard.

10:56:59 15 And then the similar question for Alaska, the  
16 Alaska Defense Force, I think.

17 MR. HILTON: I don't know the answer with respect  
18 to Alaska.

19 With respect to Texas, I don't have the number for  
10:57:09 20 you.

21 The Texas State Guard is a volunteer force,  
22 primarily, is my understanding, and it doesn't have that  
23 honor and authority of also serving in the National Guard of  
24 the United States.

10:57:25 25 So we've made that argument, that they can't really



1 be thought of as one-to-one substitutes of each other because  
2 there are additional benefits and honors that go along with  
3 being a member of the National Guard of the United States.  
4 Of course there are.

10:57:39 5 As far as what percentage would have considered  
6 were those facts different, I don't think we have that  
7 information. But I will say that, the harm of members  
8 leaving due to this requirement, that has already been  
9 occurring. It is certain to occur. And it's, I think,  
10:57:59 10 unrebutted by defendants that that will occur.

11 The primary factual rebuttal they make to the issue  
12 of attrition and reduction in forces is that, well, the  
13 amount of attrition as a result of this is going to be  
14 consistent with the normal organic attrition, as Your Honor  
10:58:15 15 calls it. I think that's a good term for it. But what  
16 defendants don't grapple with is that that's going to be on  
17 top of whatever attrition occurs for other reasons.

18 They also don't respond or grapple with the  
19 unrebutted testimony from our declarants that explains the  
10:58:34 20 immense cost in terms of time and money and loss of  
21 experience that will necessarily come with attrition of this  
22 kind. So my view would be that the factual, real-world,  
23 on-the-ground harm, as I would call it, is largely undisputed  
24 by defendants.

10:58:56 25 There's also another type of harm, I think, that is

1 really, for lack of a better term, a legal harm, and that's  
2 the injury to the plaintiffs themselves and their command  
3 authority. So if their right to command their forces in  
4 non-federalized status is being impinged, and accountability  
10:59:17 5 is unclear, and their forces are being put in this impossible  
6 situation with competing orders, that itself is its own  
7 injury. It's primarily a legal injury to the chain of  
8 command, but it has real-world effects. And it's the duty of  
9 these plaintiffs to safeguard that authority for future  
10:59:39 10 commanders-in-chief of their state forces.

11 So I would say there's really two types of injury.  
12 I don't think, if our -- if our legal theory is correct,  
13 there -- you know, that there's a question that there would  
14 be a legal injury. And, with respect to the factual  
10:59:53 15 boots-on-the-ground injury, again, I think that evidence is,  
16 largely, un rebutted.

17 I'll also add that defendants go to great lengths  
18 to -- I'll also add that defendants go to great lengths to  
19 discuss COVID, to discuss the effectiveness of the vaccine,  
11:00:12 20 the impact of the vaccine, the reasons why it was a readiness  
21 requirement. To a certain extent, none of that is really at  
22 issue before the Court. We're, largely, not disputing any of  
23 that. And our Administrative Procedure Act challenge doesn't  
24 hinge on those determinations and those considerations.

11:00:33 25 When we are talking in terms of our APA challenge,

1 the things that they ignore are things like the effect of  
2 this requirement on these states who are going to have high  
3 attrition in response to a COVID vaccine. How is the federal  
4 government and the State National Guard, as partners, how are  
11:00:51 5 they going to deal with that, the reliance interests of the  
6 states in being able to govern the day-to-day administration  
7 of their forces, and having that upset for the first time, as  
8 far as we can tell.

9 So when we're talking about injuries, I really  
11:01:11 10 think most of the evidence is unrebutted and hinges primarily  
11 on whether our legal theory is correct under the  
12 likelihood-of-success factor.

13 THE COURT: Very good. Thank you, Mr. Hilton.

14 Mr. Avallone, will you be presenting on behalf of  
11:01:27 15 the defendants?

16 MR. AVALONE: Yes, Your Honor.

17 THE COURT: Let me start you off at the same place  
18 I started Mr. Hilton off, which is if you have anything to  
19 say about my exposition of the relevant constitutional  
11:01:43 20 provisions and statutory provisions, as well as the relevant  
21 executive actions here and how they all relate to each other.

22 A couple of reminders about my questions or  
23 reflections. I do understand, and I think the federal  
24 government agrees -- this is at page 1 of its opposition to  
11:02:13 25 the motion -- that for National Guard members who -- for

1 National Guard members, as such -- the ones who have not been  
2 activated, right? Because, remember, they leave their  
3 National Guard status once they are activated. That the  
4 federal government's authority to set the medical readiness  
11:02:36 5 standards comes from US Constitution Article I, Section 8,  
6 Clauses 15 through 16. That's the authority that you cite  
7 and say that the authority comes from. Which is another way  
8 of saying that until the National Guard members are  
9 activated, and, as such, cease to be in the National Guard  
11:02:57 10 and become part of the active service in the Armed Forces,  
11 the federal government's authority does not come from the  
12 President's Article II power over the Armed Forces; correct?  
13 It comes from Congress's power over the militia, which has  
14 been delegated to the President in Section 110. Is that  
11:03:19 15 correct?

16 MR. AVALONE: Your Honor, I --

17 THE COURT: That's what you say. I just want to  
18 make sure I'm stating it correctly.

19 MR. AVALONE: That is correct.

11:03:27 20 THE COURT: And that's fine. I don't know that  
21 that bears terribly, other than ruling out a potentially  
22 really broad theory that I didn't understand you to be  
23 arguing, but I just wanted to make sure.

24 So, then, as to Congress's power, which has been  
11:03:44 25 delegated to the President in Title 32, the federal

1 government's relying on the militia clauses, and, of course,  
2 the spending clause; right? Which has been discussed  
3 repeatedly as this is -- you're arguing this is just a  
4 funding condition; correct?

11:04:05 5 MR. AVALONE: That's correct, Your Honor.

6 THE COURT: Let me just backtrack one moment to the  
7 last question I asked.

8 Are there federal reserve units of the United  
9 States Armed Forces other than the National Guard?

11:04:21 10 MR. AVALONE: Yes, Your Honor. There's the Army  
11 National Guard, the -- or sorry -- the Army Reserves, the  
12 Navy Reserves. There are many other -- each individual  
13 service has other reserve components that are not part of the  
14 National Guard.

11:04:34 15 THE COURT: Okay. And the authority of the federal  
16 government to impose rules for those, conditions on their  
17 pay, that authority stems from Congress's power to establish  
18 the Armed Forces under Article I and the President's Article  
19 II power as commander-in-chief under the Armed Forces;  
11:04:55 20 correct?

21 MR. AVALONE: That is correct, Your Honor.

22 THE COURT: But, as to the reserve units that are  
23 the National Guard, that power comes from the militia  
24 clauses, the spending clause as to Congress, and then the  
11:05:05 25 President's power over the militia when activated under

1 Article II; is that correct?

2 MR. AVALONE: Correct, Your Honor.

3 THE COURT: I just want to make sure I understand  
4 the lay of the land.

11:05:18 5 So plaintiffs' main argument is that -- as to  
6 authority, as opposed to arbitrary and capricious -- seems to  
7 come down to the way in which the order to receive the COVID  
8 vaccination is enforced. And I guess, in a sense, that's  
9 what the analysis of any order comes down to, because what is  
11:05:47 10 an order but for the ability to enforce it. So the ability  
11 to enforce that you're relying on here is 32 US Code Section  
12 108.

13 What do you say about the plaintiffs' point that  
14 the trigger for the withholding of benefits under that  
11:06:08 15 statute is that a state fails to comply with the requirement  
16 of this title or a regulation under this title, and that the  
17 non-compliance here is not by a state but by an individual  
18 member of a National Guard of a state?

19 MR. AVALONE: So I think it might be helpful to go  
11:06:31 20 back to the constitutional text we were looking at before.  
21 Specifically, Clause 16. And I think the key here is going  
22 to be the very last portion of Clause 16, where it reserved  
23 to the state respectively, the appointment of the officers  
24 and the authority of training the militia -- and this is the  
11:06:48 25 important part -- according to the discipline prescribed by

1 Congress.

2 And where the current statutory framework sits on  
3 that clause is that Title 32 training and duty is, as we  
4 discussed, under the direction of the state but needs to be  
11:07:10 5 according to the discipline prescribed by Congress.

6 And the second kind of factual issue that I wanted  
7 to point out is that Title 32 duty is not paid for by the  
8 state. It's not paid for through a pass-through. It is paid  
9 directly by the Department of Defense. And we talked about  
11:07:32 10 it in our briefs, it's the defense financial and accounting  
11 services.

12 So, while we do discuss the spending clause, that's  
13 actually in reference to another enforcement -- another part  
14 of the -- what the plaintiffs are calling the enforcement  
11:07:48 15 memos where the secretary of defense has indicated that there  
16 should be no Department of Defense spending for service of  
17 unvaccinated or folks that don't meet that requirement.

18 So I think it's a little bit different. So, for  
19 the individuals, it comes down to can you participate in  
11:08:08 20 Title 32? And under the Constitution, Congress gets to set  
21 the discipline. And, as we all agree, the requirement to be  
22 vaccinated against COVID-19 is one of many, many federal  
23 requirements necessary, and it's founded in the discipline.  
24 And that's why, if you don't meet that requirement, you  
11:08:31 25 cannot participate in Title 32.

1           So it's not necessarily withholding pay. It is  
2 saying can you participate and earn those benefits.

3           THE COURT: And so I'm focused a little more in  
4 this question on the plaintiffs' statutory authority  
11:08:55 5 argument. The plaintiffs make an argument of lack of  
6 constitutional authority, but then they also have an argument  
7 of lack of statutory authority.

8           And the point that I was discussing this morning at  
9 the most length, I believe, with Mr. Hilton was, what's the  
11:09:11 10 scope of this statutory authority under Section 108 for the  
11 National Guard of a state to be barred, in whole or part,  
12 from receiving money or any other paid benefit or privilege;  
13 and does that authority include the enforcement mechanisms,  
14 if you will, or the conditions on receiving benefits in the  
11:09:40 15 challenge memoranda here?

16           And one of Mr. Hilton's points was that the trigger  
17 for this forfeiture of federal benefits in Section 108 is a  
18 failure by the state -- it says if a state fails to comply.  
19 There's an open interpretation question about what does that  
11:10:02 20 mean, a state? Is militia part of a state for purposes of  
21 this clause? If so, are individual militia members part of  
22 the militia, which is part of the stated purposes of this  
23 clause?

24           I didn't see any authority cited really either way  
11:10:24 25 on that question, but do you have anything you want to call



1 to my attention on that point or authority to present?

2 MR. AVALONE: So I think that the key part here is  
3 the authority -- and, once again, the second half, where it  
4 discusses that the National Guard of that state is barred, in  
11:10:42 5 whole or in part. As Your Honor mentioned, that's extremely  
6 broad language.

7 And, also, it doesn't direct the withholding of  
8 payments to the state. It authorizes the President to  
9 withhold from the National Guard of that state as its  
11:11:01 10 entirety or in part, and that could be whatever subpart. It  
11 doesn't limit it to units or individuals. Or, you know, if  
12 they're not buying the correct type of helmet, the President  
13 can say: You're not buying the correct helmets. If you  
14 don't buy the correct ones, we're not going to pay for them.  
11:11:20 15 It is -- that, in part, is key.

16 THE COURT: So your argument is that the statute's  
17 recognition that the National Guard can be barred in whole or  
18 part sort of implicitly recognizes that the Guard component  
19 of the state has different parts, and that a part of that can  
11:11:44 20 fail to comply in the same way that a part could be barred  
21 from receiving money.

22 And I see the textual point. I am just wondering  
23 if you have any cases or other authority outside of just the  
24 textual point from the language of the statute?

11:12:03 25 MR. AVALONE: Your Honor, I do not have anything

1 additional on that particular point.

2 THE COURT: It's a case of first impression, I  
3 suppose, on that point.

4 What do you understand as the difference between a  
11:12:18 5 punishment of a guard member -- now I'm moving to the  
6 constitutional argument about the fact that governance is  
7 reserved to the state as to militia members that are not  
8 federalized. What do you understand as the distinction  
9 between governance and punishment and merely setting the  
11:12:42 10 standards of discipline?

11 MR. AVALONE: So, Your Honor, I think a good way  
12 to approach that question is to look at what's been happening  
13 historically. And, if you look at every single state, there  
14 is a uniform code for military justice, and there's a federal  
11:13:00 15 code for military justice.

16 And when folks are in federal service, if there is  
17 a consequence, then it goes to the federal system. If  
18 somebody, for example, is in state active duty while they're  
19 in the National Guard, and there is something that comes up  
11:13:18 20 that needs to be addressed, that is addressed through the  
21 state's processes. And those are usually -- those are laid  
22 out by each state, usually by the state's legislatures, et  
23 cetera. We actually cite to quite a few provisions of  
24 Texas's and Alaska's governance provisions.

11:13:41 25 And one key part here is that, at least for Texas

1 and Alaska, they make clear that the governance cannot  
2 conflict with federal law and regulations. So, even if there  
3 was a governance argument there -- and we don't believe that  
4 there is. We believe that each step of the enforcement  
11:14:04 5 memoranda can be traced back to statutory authority going  
6 back to the constitutional authority, and so there is no room  
7 for a viable Tenth Amendment governance argument.

8 But even if there were, because those -- the state  
9 statutes place a limit on the authority, the governance  
11:14:24 10 authority, if there were to be a conflict, that should also  
11 be dispositive. But that's really where we see the  
12 difference between those two.

13 And, also, when they are in their different  
14 statuses. So, as a commander-in-chief, can you tell a  
11:14:43 15 particular unit to go here, go there, to engage them to the  
16 operation? Those are, traditionally, what has been seen as  
17 governance.

18 THE COURT: As a matter of constitutional  
19 authority, do the defendants concede that, as to members of a  
11:15:07 20 state militia who are not currently called into federal  
21 service, that the limitation of Congress governing those  
22 militia members would prohibit Congress from imposing -- from  
23 enforcing orders through court-martials; and, ultimately,  
24 restrictions of liberty, such as confinement?

11:15:45 25 In other words, as to non-federalized militia

1 members, even though I understand that defendants maintain  
2 that they have authority to impose funding restrictions,  
3 because it is federal money, do the defendants acknowledge  
4 that the limitations of the second militia clause would  
11:16:15 5 prohibit enforcement of orders through incarceration?

6 MR. AVALLONE: Well, Your Honor, I want to make a  
7 couple of distinctions, because you mentioned the  
8 non-federalized militia, and we had talked a little bit  
9 about, this morning, how that label of militia can fall into  
11:16:31 10 three different pools: The unregulated militia, it could  
11 also mean the state militia, and it can also mean the  
12 National Guard.

13 So I'm assuming --

14 THE COURT: And I'm just -- I'm sorry to interrupt  
11:16:42 15 you. I'm just talking about the constitutional argument.

16 For the constitutional purposes, the National Guard  
17 isn't a thing. That's a statutory creation. For  
18 constitutional purposes, the object of inquiry is the  
19 militia; right? I mean, there's no mention of a National  
11:17:00 20 Guard in the Constitution. It's called a militia.

21 So I'm just asking, for constitutional purposes,  
22 could -- you agree -- you're arguing that Congress's and the  
23 President's power as to a state militia that's not called  
24 into active service, it does include the power to set forth  
11:17:20 25 the conditions on funding that militia.

1 I mean, after all, Congress isn't required to give  
2 that militia any funding in the Constitution. So, when  
3 Congress does choose to exercise its spending clause  
4 authority and its authority to arm a militia, it's allowed to  
11:17:38 5 create conditions and say, well, you have to -- to get this  
6 money, you have to comply with these conditions.

7 MR. AVALONE: Right.

8 THE COURT: I understand that point.

9 I'm just trying to understand, is that the limit of  
11:17:48 10 your argument? And asking, so you are conceding, right, as  
11 to those non-federalized members of the militia, the  
12 Constitution would not allow Congress or the President to put  
13 them through a court-martial and put them in jail for failing  
14 to comply with the discipline imposed by Congress?

11:18:07 15 The consequence of failing to comply with the  
16 discipline imposed by Congress is you don't get Congress's  
17 money; you don't get federal money. The consequence is not  
18 and, constitutionally, cannot be you put a member of the  
19 militia in jail; is that correct?

11:18:24 20 MR. AVALONE: So, Your Honor, you are pushing me  
21 to the limits of the intricacies of National Guard procedure,  
22 but it's my understanding that --

23 THE COURT: Well, again, I'm not -- you said  
24 National Guard. I'm talking, just as a constitutional  
11:18:36 25 matter, about what does the Constitution say.

1 But go ahead. Go ahead.

2 MR. AVALONE: So I think it's helpful to have the  
3 concrete example to kind of see how these all -- how they  
4 divide and shake out. If there is an individual who is not  
11:18:51 5 a -- not federalized but is in the National Guard, it's my  
6 understanding that there can be -- in the federal military  
7 can initiate court-martial proceedings so long as it is done  
8 under the state's court-martial regime.

9 And so there can be -- and that's why I want to  
11:19:13 10 make sure and parse that all out, because it is possible for  
11 the federal government to initiate court-martial proceedings  
12 under the state's laws.

13 Given the nuances there, I'm not sure it's happened  
14 very frequently. But it's my understanding that that is  
11:19:33 15 something that is possible.

16 THE COURT: Well, but if the punishment's being  
17 imposed in a state court-martial regime, then the punishment  
18 is being imposed by the State.

19 MR. AVALONE: Correct.

11:19:48 20 THE COURT: And maybe the federal government is,  
21 essentially, the complainant filing a complaint, but it's not  
22 the one actually imposing a punishment, right?

23 MR. AVALONE: That's correct, Your Honor.

24 THE COURT: Okay. So, at least as I understand  
11:19:59 25 what you're saying, that's not punishment by a federal

1 official. Maybe they're instigating the complaint process,  
2 but they're not actually imposing the punishment.

3 MR. AVALLONE: I think that's fair.

4 THE COURT: Okay. And so, essentially, I think  
11:20:17 5 you're agreeing, or at least you don't have any data point to  
6 the contrary, that, as a constitutional matter, the power to  
7 incarcerate a member of a state militia for failing to obey  
8 an order belongs to -- at least, when that militia member is  
9 not called into active service, belongs to members of -- to  
11:20:44 10 the appropriate governing authority under state law, the  
11 state court-martial regime or the state governor, whatever  
12 the state's law provides. Is that correct?

13 MR. AVALLONE: I believe that's correct, Your  
14 Honor.

11:20:56 15 THE COURT: And is there anything about the  
16 executive orders here that would allow for a federal official  
17 to order a state militia member into jail for failing to get  
18 the COVID-19 vaccination as failure to obey an order?

19 MR. AVALLONE: In the enforcement memorandum, as  
11:21:23 20 listed out there as the consequences, that is not one of the  
21 consequences that's listed there.

22 THE COURT: Is there anything in the other residue  
23 of federal law that would interplay with the enforcement  
24 memoranda and allow a federal official to put a state militia  
11:21:40 25 member who is not in active federal service in jail for

1 insubordination on account of failing to get the COVID  
2 vaccination?

3 MR. AVALONE: Your Honor, I'm not aware of any.

4 THE COURT: I didn't see it either, but I just  
11:21:55 5 wanted -- you know, you're an officer of the court, and you,  
6 presumably, know this area of law better than me. And so  
7 I'll rely on that representation unless I see contrary  
8 evidence, and I don't think the plaintiffs have shown me any  
9 either.

11:22:10 10 Why don't you take this opportunity to go ahead and  
11 respond to plaintiffs' other points and present any other  
12 argument you have this morning.

13 MR. AVALONE: Sure. I thought it just might be  
14 helpful, because there were so many documents in the  
11:22:38 15 enforcement memoranda, to kind of walk through each of them  
16 and trace back exactly the statutory and constitutional  
17 authority for what's in each one.

18 And the plaintiffs have identified five documents  
19 that they have -- they call the enforcement memoranda.

11:22:51 20 The first one is an August 24th memo, and that's  
21 found at ECF Number 25-1. And that's a memo from the  
22 secretary of defense that established vaccination against  
23 COVID-19 as mandatory for all armed services, including the  
24 National Guard, and directed the secretaries to require  
11:23:15 25 vaccinations.



1 And the authority for that additional requirement  
2 goes back to the Constitution, Article I, Section 8,  
3 Clause 16, as it relates to the National Guard, and which  
4 tasks Congress with setting discipline for the militia, and  
11:23:34 5 32 USC Section 110, which delegates that authority to the  
6 President.

7 And, as we mentioned in our brief, the secretary of  
8 defense exercises the President's authority when it comes to  
9 these sorts of matters, and that's been recognized by the  
11:23:51 10 Supreme Court for quite a long time. So that's the first  
11 memorandum, August 24.

12 The second memo is from September 14, and this one  
13 does not appear to be filed on the docket but it's described  
14 in the amended complaint, paragraph 59. And, there, that was  
11:24:13 15 the secretary of the Army ordering COVID-19 vaccination and  
16 set the requirement.

17 And, once again, that goes back -- for the National  
18 Guard folks, goes back to Article I, Section 8, Clause 16,  
19 and that's the authority to set discipline. And, for the  
11:24:35 20 secretary of the Army, he's authorized by statute, and that  
21 statute is 10 USC Section 10202(a). And that is Congress  
22 delegating the authority to issue regulations for reserve  
23 components like the National Guard so long as it's at the  
24 direction of the secretary of defense. If you go back to the  
11:25:00 25 memo beforehand, the secretary of defense had ordered the

1 secretary of the Army to do that.

2 The third enforcement memo is from November 30, and  
3 that is a secretary of defense memo clarifying and  
4 emphasizing that the vaccination is a requirement for members  
11:25:19 5 of the National Guard and the Ready Reserve. That just  
6 reiterated the requirement, and it's authorized by the same  
7 authority we just talked about.

8 What that also did is it set out three consequences  
9 for failure to meet that requirement. And the first one is  
11:25:37 10 that an individual must be vaccinated in order to participate  
11 in drills, training, or other duties conducted under Title 32  
12 US Code.

13 And, as we talked about, that can be traced back to  
14 the Constitution, which allows states to direct training so  
11:25:55 15 long as it complies with the discipline that was prescribed  
16 by Congress.

17 The second consequence is that no Department of  
18 Defense funding may be allocated for payment of duties under  
19 Title 32 for members of the National Guard who do not comply  
11:26:18 20 with DoD COVID-19 vaccination requirements. And, as we  
21 talked about this morning, that goes to the spending power,  
22 and this is a direction to a subagency within the Department  
23 of Defense as to who to give money to.

24 And then the third consequence is there will be no  
11:26:35 25 credit or excused absences for members who do not participate

1 in drills, training, or other duty for failure to be fully  
2 vaccinated against COVID-19.

3 And, once again, that can get traced back to the  
4 Constitution where the states are allowed to conduct the  
11:26:52 5 training so long as it is according to the discipline  
6 prescribed by Congress. Congress delegated that authority to  
7 the President, and the secretary of defense exercises that  
8 authority.

9 THE COURT: And do any of these three consequences  
11:27:06 10 go beyond the consequences for members of the National Guard  
11 who do not receive the other vaccines required by federal  
12 officials? The eight other vaccines, I believe, like flu  
13 vaccine, do any of these consequences in this memo go beyond  
14 the consequences for failing to receive one of the other  
11:27:31 15 eight required vaccines?

16 MR. AVALONE: If I understand Your Honor's  
17 question correctly, is the COVID vaccine treated differently  
18 than the other vaccines?

19 THE COURT: Right.

11:27:41 20 MR. AVALONE: Under the standards, it is -- if you  
21 do not meet medical readiness, you're not qualified to  
22 participate in Title 32 training. That is not unique to  
23 COVID-19.

24 You can even -- and some of this is in the Bradley  
11:27:59 25 declaration, which is in ECF Number 33-2 in paragraph 4.

1 And, there, he talks about how members must be up to date  
2 with their medical readiness health assessments. Even dental  
3 assessments. So, if you don't go to the dentist and haven't  
4 taken care of your cavities, you also may not be eligible to  
11:28:23 5 participate in Title 32 training.

6 THE COURT: You will have your funding for those  
7 duties withheld, and you'll not receive credit or excused  
8 absence due to failure to receive the flu vaccine, for  
9 instance?

11:28:40 10 MR. AVALONE: That's under the Department of  
11 Defense Instruction 1215.13. And that sets the requirements  
12 for participating in the reserve, which includes the National  
13 Guard.

14 So, yes, if you have not completed your health  
11:28:57 15 assessments, which include vaccinations, then you're not  
16 eligible to participate in Title 32, and that would not be an  
17 excused absence.

18 THE COURT: Okay. Go ahead.

19 This is Memo Number 3.

11:29:08 20 MR. AVALONE: So then we move on to Memo Number 4,  
21 which is the December 7 memorandum from the secretary of the  
22 Air Force, and that's filed at ECF Number 25-5, Attachment 2.  
23 That discusses the Air National Guard.

24 The secretary there confirms the requirement to  
11:29:24 25 receive the vaccination. Once again, we've talked about the

1 Constitution and statutory authority there. It's the same  
2 Article I, Section 8, Clause 16, the authority to set  
3 discipline. And, since this is the secretary of the Air  
4 Force, the statutory authority is 10 USC Section 10202(a),  
11:29:44 5 and that's specific to the secretaries of each -- for the Air  
6 Force or the Army.

7 The secretary of the Air Force withdrew consent for  
8 members who are not fully vaccinated to be placed on active  
9 guard and reserve orders. Plaintiffs do not contest that the  
11:30:03 10 secretary had that authority.

11 That also set the deadlines to initiate the  
12 vaccination regimen and said thereafter those who had not  
13 initiated by December 31 could not participate in drills,  
14 training, or other duty conducted under Title 10 or 32. And,  
11:30:21 15 once again, that's the same authority going back to the  
16 Constitution to set discipline.

17 And then the fifth enforcement memo, December 14 --

18 THE COURT: I'm sorry. On Memo 4, this memo was  
19 not specific to the Air National Guard; was it? It also  
11:30:41 20 included non-National Guard members of the Air Force?

21 MR. AVALONE: Yes, Your Honor. At Attachment 2,  
22 that's what's specifically discussed, the consequences for  
23 the folks that are in the Air National Guard.

24 The fifth and final enforcement memo was for  
11:30:58 25 December 14. I don't believe that there's a copy in the

1 record, but it's described in Amended Complaint 60. And,  
2 once again, it's the same consequences as the Air Force,  
3 withdrew consent for the active guard and reserve duty and  
4 then said that the folks could not -- who did not meet that  
11:31:18 5 federal requirement could not participate in Title 32  
6 training.

7 And so those are the enforcement orders. And so,  
8 with each of those consequences, if we can trace those back  
9 through statute to the Constitution, then there is no viable  
11:31:37 10 Tenth Amendment claim.

11 And the plaintiffs had described their Tenth  
12 Amendment claim as the governing argument and -- because, if  
13 you take a look at Clause 16, there is an explicit delegation  
14 of authority to the states which is to the appointment of  
11:32:07 15 officers and the authority for training according to the  
16 discipline prescribed by Congress, but it was not explicitly  
17 delegated for the governing aspect. So the path for that  
18 particular claim goes through the Tenth Amendment.

19 And as the Supreme Court explained, the appropriate  
11:32:24 20 way to analyze the Tenth Amendment argument is for the Court  
21 to look to see whether the federal government had the power  
22 to take the challenged actions; and, if so, there cannot be a  
23 Tenth Amendment violation.

24 And so -- in some of their briefing, plaintiffs had  
11:32:46 25 taken the idea that what was reserved as a governing power

1 could somehow restrict the explicitly delegated powers. That  
2 flips the Tenth Amendment analysis on its head, and it's not  
3 really the right way to be looking at it.

4 THE COURT: Do you care to respond, present any  
11:33:18 5 oral argument in response to plaintiffs' APA argument under  
6 the arbitrary and capricious clause about the relevant  
7 defendants' failure to consider the full range of relevant  
8 considerations in entering these five memoranda?

9 The plaintiffs argue that consideration was  
11:33:47 10 obviously given to readiness to incorporate federally, but  
11 there wasn't express consideration of other relevant factors,  
12 such as bodily integrity or religious liberty.

13 Do you care to respond to that point?

14 MR. AVALONE: Well, Your Honor, in terms of bodily  
11:34:04 15 integrity and religious liberty, the military has a system  
16 set out for folks that have religious objections. They can  
17 submit a request. It goes through a process. And they can  
18 also bring those claims individually in court, and many folks  
19 have.

11:34:21 20 So, in terms of the -- and, to be clear, plaintiffs  
21 here have not brought a religious liberty claim. And I don't  
22 believe they have standing to do so because they are --

23 THE COURT: Right. No. I'm aware of the other  
24 cases where the individual members are arguing that the  
11:34:38 25 process affords them relief they haven't received.

1 MR. AVALLONE: In terms of arbitrary and  
2 capricious, the entire point of the National Guard -- and  
3 take a look at the Constitution and at the Federalist Papers  
4 that describe why we set up the organized militia. The point  
11:35:01 5 is to prepare for a unified federal national defense.

6 And so, while there may be residual benefits to the  
7 states for maintaining National Guards -- and the states here  
8 obviously would prefer to have funding that comes from these  
9 additional individuals, but the point of the National Guard  
11:35:31 10 is to prepare folks -- like the Texas National Guard, which  
11 has a history of heroism, particularly World War II. They  
12 were on the beachheads in Italy, the first division of  
13 Americans on continental Europe, fought through Southern  
14 France and took the fight all the way to the Nazi's homeland.

11:35:52 15 These are heroes. And the reason they were able to  
16 integrate seamlessly into the federal forces is because there  
17 was uniform standards. And so it is not arbitrary and  
18 capricious for the United States military to take those  
19 considerations of force readiness and have those be paramount  
11:36:16 20 when deciding whether or not to add new requirements.

21 And then, in terms of the irreparable harm, first,  
22 I just want to emphasize that plaintiffs must show  
23 irreparable harm in order to get a preliminary injunction.  
24 There seemed to be some questions in the brief whether or not  
11:36:37 25 they showed that, and the case law clearly says that they



1 must.

2 And, here, the enforcement memorandums, they have  
3 restrictions on Title 10 and Title 32 duties. They do not  
4 restrict the ability for the Texas National Guard and the  
11:36:55 5 Alaska National Guard to have their folks on state active  
6 duty, and state duty is paid for by the state. And while the  
7 state may use federal equipment, they pay the federal  
8 government to use that.

9 And so the bottom line is that the vaccination  
11:37:12 10 requirement will have no impact on operations like Operation  
11 Lone Star, which the Texas National Guard participates in  
12 state active duty, paid for by the residents of Texas under  
13 the exclusive direction of the governor.

14 And the second reason why that's not irreparable  
11:37:37 15 harm, Your Honor -- we discussed it a little bit earlier  
16 today -- was that both states maintain a state guard, and  
17 members of the state guard are not entitled to pay allowances  
18 or medical care or funds from the United States. Those are  
19 entirely paid for by the states, and the states are free to  
11:38:00 20 hire as many as folks as they'd like into those state guards.

21 The other theory of irreparable harm was the  
22 interference with the governor's authority. And just first,  
23 to be clear, it's not even clear that there is a conflict  
24 between what plaintiffs are calling the enforcement memoranda  
11:38:23 25 and the challenge or the orders that are identified by

1 plaintiffs, because the enforcement memoranda apply to  
2 federal officials and direct federal officials to take  
3 certain actions. They do not ask state officials to take  
4 actions in their state capacities.

11:38:40 5 But even if there was a conflict between both  
6 governors' executive orders and federal law or regulations,  
7 the state statutes make clear that federal law and  
8 regulations prevail. And we've listed all that out in our  
9 briefing.

11:38:58 10 Just to give you an example, Texas Government Code,  
11 annotated, Section 437.004, says the governor can issue  
12 regulations, quote: According to existing federal and state  
13 law, end quote. And that's related to governing the National  
14 Guard.

11:39:17 15 Alaska has similar requirements that the Alaska's  
16 adjutant general and governor may issue regulations but only  
17 if the matters are, quote, not otherwise provided for by the  
18 laws of the United States or regulations adopted by the  
19 President. And that's Alaska Statute Section 26.05.340(d).

11:39:44 20 So, even if there were a conflict between the  
21 governor's executive orders and federal law, the state law  
22 would have restricted those orders, and their lawful exercise  
23 of their authority would not have been impinged.

24 And, finally, the public interest. And when the  
11:40:05 25 government opposes a preliminary injunction, the factors of

1 balance of equities and public interest merge. And, to be  
2 clear, it would be in the public interest to ensure that  
3 every member of the Texas and Alaska National Guards remain  
4 ready for federal service.

11:40:22 5 Defendants' strong interest is ensuring that the  
6 folks that are in those National Guards are ready for federal  
7 service should the call come out that they are needed to  
8 defend their nation.

9 The public also has a strong interest in ensuring  
11:40:42 10 that the Armed Forces, including the National Guards, are fit  
11 and healthy.

12 Justice Kavanaugh had a concurrence in  
13 *Austin versus Navy Seals 1-26*, where he described, quote:  
14 Sending ships into combat without maximizing the crew's odds  
11:40:58 15 of success, which -- such as would be the case with ship  
16 deficiencies in ordnance, radar, working weapons, or the  
17 means to reliably accomplish the mission, is dereliction of  
18 duty. The same applies to ordering unvaccinated personnel  
19 into an environment in which they endanger their lives, the  
11:41:17 20 lives of others, and compromise the accomplishment of  
21 essential missions.

22 And I thought that summed it up quite nicely as to  
23 why the public has an interest in this.

24 And the -- finally, the public interest in equities  
11:41:31 25 support that the federal government and the taxpayers from

1 across the nation only pay for training of individuals who  
2 are ready for federal service. That's the purpose of the  
3 National Guard, to prepare for federal service.

4 And if we're asking other states to pitch in on the  
11:41:50 5 federal level, it should be for training for individuals who  
6 are ready to serve at a federal level.

7 And principles of federalism also support denying  
8 the preliminary injunction. The Constitution, which we've  
9 talked about quite a bit today, sets out the respective  
11:42:08 10 responsibilities for federal and state officers, and the  
11 power to set the vaccination requirements squarely fits  
12 within the enumerated powers. And allowing a state to rely  
13 on implied reserve powers to restrict and block the exercise  
14 of explicitly enumerated powers would turn federalism on its  
11:42:32 15 head, and such a result would not be in the public interest.

16 And so, Your Honor, for all those reasons, we would  
17 ask that you deny the motion for preliminary injunction.

18 THE COURT: Very well. Thank you.

19 Mr. Robison, I haven't given you a chance to speak.  
11:42:49 20 I know Alaska's scheme differs somewhat from Texas's scheme  
21 but appears similar in many of the relevant regards.

22 Is there anything that you want to add or call to  
23 my attention as I consider your motion in support of the  
24 other briefing?

11:43:08 25 MR. ROBISON: Yeah. I'm not sure I could do any

1 better than Mr. Hilton did, Your Honor. I would at least  
2 respond to the Court's question about do guardsmen in Alaska  
3 have an interest in joining the state defense force if  
4 they're unable to serve in the guard.

11:43:20 5 I, like Mr. Hilton, don't have any specific numbers  
6 on that. My sense is no.

7 Also, just to be frank with the Court -- and I'm  
8 sure you've noticed -- we don't have a declaration from our  
9 adjutant, so we're relying on the legal harm argument to show  
11:43:36 10 irreparable harm.

11 THE COURT: Right. And I noticed that Alaska's  
12 scheme seems to have three components of its organized  
13 militia. I think Texas, essentially, has two. It's got --  
14 the Texas National Guard, which has an Army and Air Force  
11:43:54 15 component. And then the Alaska regime, I think, had three,  
16 as I was reading the statutes. It has the Alaska National  
17 Guard with Army and Air Force components, the Alaska Defense  
18 Force, and then the Alaska Navy.

19 Did I recall that correctly?

11:44:12 20 MR. ROBISON: Yeah. I believe that's correct.

21 THE COURT: The Naval Guard or Naval Reserve,  
22 something like that.

23 I'm curious about it, but does that play any legal  
24 role in the dispute here, or is the dispute just with the  
11:44:25 25 Alaska National Guard?

1 MR. ROBISON: I don't think it factors into the  
2 legal questions here. And, frankly, I don't think it's a  
3 large component of our force.

11:44:37

4 THE COURT: Does Texas have a Texas State Navy? Do  
5 you know?

6 MR. HILTON: Unfortunately not, Your Honor.

7 THE COURT: I vaguely recall being at a ceremony  
8 where someone was awarded an honorary Texas Navy degree, but  
9 I think that was a joke. I'm not sure.

11:44:49

10 MR. OLSON: Your Honor, as one of the people who  
11 has respectfully requested that the governor confer a rank of  
12 admiral of the Texas Navy upon at least two people, I have to  
13 object to the characterization as a joke.

11:45:02

14 THE COURT: Okay. Okay. It was a conferral  
15 without legal status.

16 MR. OLSON: An honorific, perhaps.

17 THE COURT: An honorific, there we go.

18 MR. OLSON: Okay.

19 THE COURT: Maybe that's what I'm thinking.

11:45:08

20 Admiral of the Texas Navy, an honorific without legal  
21 consequence. At least, consequence here.

22 Okay. Very good.

23 So, Mr. Hilton, let me turn back to you for any  
24 reply. And, specifically, with regard to the question of  
11:45:27 25 punishment, was anything you heard from the defendants

1 requiring correction or clarification?

2 I'm focused right now on the issue of imposing jail  
3 time. Could any member of the Texas National Guard who is  
4 not in active federal service be put in jail by a federal  
11:45:50 5 official for failing to get the COVID vaccine as  
6 insubordination? And, if so, what authorities would show  
7 that -- legal authorities would show that ability?

8 MR. HILTON: My understanding is no. The  
9 enforcement memoranda don't refer to it, and I have no reason  
11:46:06 10 to dispute.

11 And I would just add the caveat that, perhaps,  
12 if -- I understand this to be a readiness requirement.  
13 Perhaps there could be a version of events where somebody is  
14 directly disobeying an order, and there may be a  
11:46:22 15 contempt-like standard where just the deliberate disobedience  
16 could eventually lead to that and the operations of some  
17 other means. But our claims don't rest on that, and we're  
18 not making that an allegation.

19 THE COURT: And, also, I didn't see in the  
11:46:33 20 complaint or motion, but just to be clear, there's not an  
21 unconstitutional conditions claim here by the plaintiffs;  
22 right? Essentially, a spending clause claim.

23 This is a claim of lack of authority under the  
24 militia clauses, under Article II's reservation -- limitation  
11:46:54 25 on the President's commander-in-chief authority as to the

1 militia.

2 But it's, essentially, a militia authority claim as  
3 to the constitutional statute, correct?

4 MR. HILTON: That's correct. And, you know, I  
11:47:07 5 think our statutory claims proceed from the premise that  
6 defendants could accomplish these objectives if they had used  
7 the methods that Congress has prescribed.

8 Because they have not done so, they can't take a  
9 shortcut to achieving by indirect means what they have not  
11:47:24 10 achieved by withdrawal of recognition or the other things.

11 THE COURT: And also, to clarify my understanding,  
12 if a member of the Texas National Guard refused to get the  
13 flu vaccine or one of the other eight required vaccines, your  
14 legal argument would also mean that the Department of Defense  
11:47:51 15 could not withhold pay or participation in drills on account  
16 of refusal to get the flu vaccine, or any other vaccine;  
17 right?

18 There's nothing specific to the COVID vaccine as  
19 opposed to other vaccines?

11:48:05 20 MR. HILTON: As a matter of federal law, that's my  
21 understanding, as a matter of federal readiness requirements.

22 Of course, it's a very different matter under state  
23 law. The executive order from Governor Abbott says that no  
24 vaccine mandate may be imposed that applies to the Texas  
11:48:23 25 Military Department.



1 And to the extent some argument around this is  
2 premised on defendants' interpretation of state law, I think  
3 the crucial thing that they fail to appreciate is that  
4 governor's Executive Order GA-39 has the force and effect of  
11:48:36 5 State law pursuant to the Texas Disaster Act, and that's  
6 Chapter 14 of the Government Code Section 418.02.

7 So, to the extent that there are State law issues  
8 here, our position would be that the governor's order is  
9 lawful as a matter of State law.

11:48:56 10 THE COURT: And then what do you say to  
11 Mr. Avallone's point that there is not, strictly speaking, a  
12 conflict between the governor's executive order and the five  
13 enforcement memoranda because the governor's order applies to  
14 governmental entities in Texas, to State governmental  
11:49:23 15 entities, and the enforcement memoranda do not require a  
16 State official or a State enforcement entity to take any  
17 particular action? The enforcement memoranda, rather, direct  
18 withholding the pay and benefits that can be executed by  
19 federal officials.

11:49:43 20 Do you agree with that, or do you have any  
21 qualifications or context for that point?

22 MR. HILTON: We don't agree with that, Your Honor.  
23 And perhaps as a technical matter of who is the person who  
24 the order is directed to, perhaps defendants may be right.  
11:49:56 25 But the effect of the orders is that separation proceedings

1 must begin once the failure to get a COVID vaccine is past  
2 the deadline. There is no discretion. And so, because of  
3 that -- you can see this in Exhibit 5, that talks about  
4 separation proceedings must begin. It talks about  
5 involuntarily putting someone on the individual Ready  
6 Reserve, which has many of the same requirements -- or  
7 effects, rather, with respect to pay and benefits.

8 So, for that reason, it's also not an acceptable  
9 substitute that these guardsmen could be put on state active  
10 duty, because, once someone is not vaccinated by the  
11 deadline, the consequence must begin. The State does not  
12 have discretion as a matter of these orders, as least, as we  
13 understand them.

14 THE COURT: Very good. Anything else you care to  
15 reply to?

16 MR. HILTON: A couple of points, if I may, Your  
17 Honor.

18 With respect to the irreparable harm point that  
19 counsel raised, saying that there's no impact to the missions  
20 because of the availability of state active duty --  
21 particularly Operation Lone Star is a state active duty  
22 mission -- I believe our declaration from Nick Kidd details  
23 that -- or, rather, excuse me -- our declaration from the  
24 Texas Department of Public Safety. That's Rick Martin.

25 That misunderstands the harm slightly. It's not

1 that there isn't another legal means available to conduct the  
2 same mission; it's that the attrition that these unlawful  
3 enforcement memoranda will cause will necessarily have  
4 impacts on the State that cannot be avoided. We know that  
11:51:49 5 that is going to happen.

6 And the declarations from the Texas Department of  
7 Emergency Management and the DPS make clear why the Texas  
8 Military Department is so crucial to many of the State's --  
9 many efforts around the state, including Operation Lone Star.

11:52:10 10 I'd also like to highlight something that counsel  
11 touched on. The State Code of Military Justice applies to  
12 these guardsmen, not the Federal Code. And that reminded me  
13 of the point Your Honor made earlier, what is an order but  
14 the power to enforce it. That distinction, right there, I  
11:52:33 15 think, is central to a lot of the issues running through our  
16 complaint.

17 When we're talking about who can govern and when,  
18 clearly, the federal government and Congress can govern  
19 troops when called into active service. And, clearly, the  
11:52:48 20 President is the commander-in-chief when called into active  
21 service.

22 But those are limited, enumerated powers, and they  
23 don't provide that authority to govern when not called into  
24 actual service. That absence of -- that lack of granting  
11:53:03 25 authority to the federal government makes clear, that must go

1 to the state, and that's true as a matter of state law.

2 I'm happy to respond to any other points or answer  
3 any other questions, Your Honor.

11:53:25

4 Let me confer with counsel to make sure that he has  
5 nothing else.

6 THE COURT: No?

7 MR. HILTON: That's all I have, unless you need  
8 something from me, Your Honor.

9 THE COURT: All right. Thank you.

11:53:31

10 Anything more from defendants, Mr. Avallone?

11 MR. AVALONE: No, Your Honor.

11:53:57

12 THE COURT: Well, let me thank everyone for  
13 traveling here and for your diligent preparation for the  
14 hearing. I thought your arguments have been presented  
15 professionally and have been very helpful to the Court.

16 The motion will remain under consideration, and  
17 court is in recess.

18 [PROCEEDINGS IN RECESS]

19

20

21 OFFICIAL COURT REPORTER'S CERTIFICATE

22

23 I (we) certify that the foregoing is a correct transcript of  
24 proceedings in the above-entitled matter.

24

25

/S/ Susan A. Zielie, RMR, FCRR  
Susan A. Zielie, RMR, FCRR  
Jund 28, 2022